

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Procedures Related to Commission Views

Docket No. RM2015-14

REPLY COMMENTS OF THE PUBLIC REPRESENTATIVE

(September 11, 2015)

On July 21, 2015, the Postal Regulatory Commission (Commission) proposed new rules that establish procedures by which it will solicit public comments that may inform the development of the Commission's Section 407 Views it provides to the Secretary of State on certain international mail matters.¹ Pursuant to the Notice, four parties submitted comments to the Commission: the Postal Service;² the Public Representative;³ Federal Express Corporation (FedEx);⁴ and Ms. Joyce Dillard.⁵ The commenters cite several provisions of the proposed rules that could benefit from clarification. Additionally, FedEx and Ms. Dillard oppose the proposed rule permitting the Commission to suspend or forego the solicitation of public comments. These reply comments respond to issues raised by selected commenters.

¹ Order No. 2602, Notice of Proposed Rulemaking Establishing Procedures Related to Commission Views, July 21, 2015 (Notice).

² United States Postal Service Comments on Procedures Related to Commission Views, August 27, 2015 (Postal Service Comments).

³ Comments of the Public Representative, August 27, 2015 (PR Comments).

⁴ Comments of Federal Express Corporation RM2015-14, August 27, 2015 (FedEx Comments).

⁵ Comments Received from Joyce Dillard, August 28, 2015 (Dillard Comments).

DISCUSSION

A. A Section 407(c)(1) Commission View is not a “Rule” to which the Notice and Comment Requirements of the Administrative Procedure Act Apply.

FedEx argues that a public inquiry docket established by the proposed rules must comply with the notice and comment requirements of the Administrative Procedure Act (APA) because a view developed by the Commission pursuant to section 407(c)(1) (Section 407 View) is a “rule” as defined by the APA. FedEx Comments at 8. However, for the reasons discussed below, FedEx’s characterization of the Commission’s views as a “rule” is incorrect.

While the APA broadly defines a “rule,” this definition does not include a statement from an expert agency intended to inform the Secretary of State regarding the consistency of a potential international agreement with U.S. regulations. The APA defines a “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]” 5 U.S.C. § 553(4). One significant characteristic of a “rule” for which an agency must satisfy the “notice and comment” requirements of the APA is that the rule must have “force and effect of law.”⁶

A Section 407 View does not fall under the APA’s broad definition of a “rule” because, absent action by the Secretary of State, such a view lacks any future legal effect. Section 407 states that the Secretary of State exercises “primary authority for the conduct of foreign policy with respect to international postal services and international delivery services, including the determination of United States position” and recognizes the Secretary of State’s power to conclude international agreements

⁶ *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–303 (1979) (internal quotation marks omitted).

related to international postal services. 39 U.S.C. § 407(b). The lack of force and effect of law is evident in the Commission's Section 407 Views themselves. When transmitting the Commission's views before the 2008 Universal Postal Union (UPU) Congress, Chairman Blair stated that the Commission understood that "it is the Department of State that is responsible for finalizing the U.S. position[.]"⁷ Accordingly, a Section 407 View is not, as FedEx argues, a Commission directive which the Secretary of State is "obliged to implement." See FedEx Comments at 9.

Moreover, a UPU body (Congress, Postal Operations Council (POC), or Council of Administration (CA)) must approve the relevant proposals before they can take effect. Thus, while the Secretary of State may vote for a specific proposal, if the proposal does not receive the requisite support from other UPU members, it has no future legal effect. Accordingly, due to the need for approval from the Secretary of State and support from a majority of UPU members for a specific proposal, a Section 407 View is not a "rule" as defined by the APA.

In support of its argument that Section 407 Views are "rules" subject to the notice and comment requirements of the APA, FedEx cites *South African Airways v. Dole*.⁸ FedEx Comments at 10. However, this reliance is misplaced because the Secretary of Transportation order at issue in *South African Airways* is distinguishable from the Commission's Section 407 Views. First, orders from the Secretary of Transportation revoking permits of foreign air carriers are not subject to affirmative approval of the President the way that Section 407 Views are subject to the approval of the Secretary of

⁷ Postal Regulatory Commission, Views Provided to U.S. Dept. of State for the 2008 UPU Congress, in accordance with 39 U.S.C. 407(c), June 30, 2008, at 3 (2008 UPU Report).

⁸ 817 F.2d 119 (D.C.Cir 1987).

State. See *South African Airways* at 122. Rather, because the Secretary of Transportation orders were merely “presented to the President for review[,]” if the President did not disapprove an order, it took effect as an action of the Department of Transportation (DOT), not of the President. *Id.* at 122-123; see 49 U.S.C. § 41307.

Unlike the orders discussed in *South African Airways*, a Section 407 View sets forth the Commission’s position on whether a proposed market dominant rate or classification is consistent with modern rate regulations and requires action by the Secretary of State.⁹ If the Secretary of State votes for a proposed market dominant rate or classification in agreement with a Section 407 View, this vote involves the foreign affairs function of the U.S. Since this determination by the Secretary of State involves the foreign affairs function of the U.S., the notice and comment rulemaking procedures required by the APA do not apply. 5 U.S.C. 553(a)(1).

Second, unlike the DOT order at issue in *South African Airways* which revoked a permit of a foreign air carrier, Section 407 Views advise the Secretary of State as to the consistency of a proposed international agreement with domestic postal regulations. The Commission’s Section 407 Views provide the Secretary of State with the expert opinion of the agency in the best position to determine the consistency of such rates and classifications with domestic postal law *prior to* when the Secretary of State votes for or against a specific proposal. Thus, Congress intended for Section 407 Views to contribute to the *development* of the United States’ position on a specific foreign relations matter. Comparatively, the Secretary of Transportation revoked *South African*

⁹ The Public Representative acknowledges the possibility that the U.S. may oppose a proposal which is approved by the UPU Congress, POC, or CA and that under the UPU Convention, the ability to submit reservations may be limited. The legal effect of such a proposal is outside the scope of this rulemaking docket and the discussion of whether a Section 407 View is a “rule” under the APA.

Airways' permit pursuant to a foreign policy determination expressed by Congress by statute and the President by executive order. *South African Airways* at 121.

Accordingly, FedEx's reliance upon *South African Airways* to support its argument that the Commission must satisfy the APA's notice and comment requirements when developing a Section 407 View is misplaced.

B. The Secretary of State and the Commission Need Flexibility When Exercising Their Section 407 Authority.

The Public Representative agrees with FedEx that there are benefits to soliciting the public for comments. PR Comments at 8; FedEx Comments at 12. The Public Representative strongly urges the Commission to provide notice and opportunity to comment when developing its Section 407 View. However, the Public Representative understands that neither the Secretary of State nor the Commission is able to control when UPU members submit proposals for consideration. For example, on April 27, 2015, twelve days after the start of the April 2015 POC meeting, the UPU published six new proposals on its website and these proposals were voted on the very next day.¹⁰

Under the proposed rules, the "Commission may suspend or forego solicitation of public comments if it determines that such solicitation is not consistent with timely submission of Commission views to the Secretary of State." Notice at 6, section 3017.4(b). By suspending or foregoing the solicitation of public comments, the Commission will be able to provide Section 407 Views to the Secretary of State in a timely manner so that the Secretary may develop a U.S. position consistent with domestic postal regulations.

¹⁰ Postal Regulatory Commission, Letter to Assistant Secretary Crocker, May 19, 2015, at 1 (2015 POC Report).

FedEx argues that the Commission must submit Section 407 Views before the Secretary of State may enter into an international agreement that proposes market dominant rates or classifications. FedEx Comments at 2. Thus, it appears that FedEx would require the U.S. to abstain from voting on late proposals regarding market dominant rates or classifications for which there is insufficient time for the Commission to satisfy the notice and comment requirements of section 553 before providing its Section 407 Views. *Id.* at 13. The Commission should not adopt FedEx's view because such an outcome would negatively impact the United States' ability to negotiate and conclude international agreements. Instead, the Commission should establish a procedure by which it provides notice and solicits public comments to the extent practicable given the potential foreign affairs implications.

C. Comments Regarding Specific Proposed Rules

1. Section 3017.1(b)

In its comments, FedEx suggests that the definition of "views" in section 3017.1(b) be revised so that it corresponds to the scope of section 407(c)(1). *Id.* at 12. FedEx observes that section 407(c) is not limited to "certain [UPU] proceedings" and argues that the proposed rules should apply to all instances to which section 407(c) applies. *Id.* at 12-13.¹¹ However, as drafted, the proposed rules do not preclude the Commission from opening a public inquiry docket or soliciting public comments in such instances. The revision requested by FedEx is unnecessary. However, the proposed rules may benefit from clarifying language indicating that section 3017 does not

¹¹ The Public Representative notes that FedEx's comments would require a revision to section 3017.3(a), which provides for the establishment of a public inquiry docket "on or about 150 days before a [UPU] Congress convenes[.]" Notice at 6, section 3017.3(a).

preclude the Commission from initiating a public inquiry docket and solicit comments on a non-UPU treaty, convention, or amendment that establishes a market dominant rate or classification.

2. Section 3017.3

In its comments, FedEx argues that this section “addresses only rates and classification established by agreement at a UPU *Congress*.” FedEx Comment at 13 (emphasis in original). However, as drafted, one may interpret the proposed rules to provide for a public inquiry docket for each UPU Congress, which would include relevant proposals for POC or CA meetings following that Congress.¹² For example, the public inquiry docket for the 2016 UPU Congress may also include matters related to the development of the Commission views on relevant proposals for the POC and CA meetings held between the 2016 UPU Congress and the next UPU Congress in 2020. The proposed rules may benefit from clarification on whether the Commission intends for their application to relevant proposals submitted to the POC or CA.

In its comments, FedEx argues that section 3017(a) “suggests that the Commission can limit its Views to a ‘high level’ review[.]” FedEx Comments at 13. However, as drafted, the proposed rules would not allow the Commission to provide its Section 407 Views in a “general way” or fail to provide Section 407 Views on “specific relevant proposals.” Rather, section 3017.3(a) applies to the comments submitted by interested parties, not the Commission’s Section 407 Views. The proposed rules permit parties to submit general principles that should guide the Commission in developing its

¹² The proposed rule states that a public inquiry docket “may also include matters related to development of the Commission’s views, such as the availability of relevant proposals, Commission views, and other documents, or *related actions*.” Notice at 6, section 3017.3(b) (emphasis added).

Section 407 Views on specific proposals, especially in situations where the text of the specific proposals may not be available. For example, a commenter may argue that the Commission should ensure that the proposals do not discriminate between designated postal operators, such as the Postal Service, and non-designated operators, such as FedEx. While this commenter may not be addressing a specific proposal, this general principle may be applicable to a number of relevant proposals. The Public Representative supports the inclusion of section 3017.3(a) as drafted.

CONCLUSION

The Public Representative supports establishing rules to formalize the process by which the Commission solicits comments that may inform the development of the Commission's Section 407 Views. For the above mentioned reasons, these views are not "rules" for which the Commission must satisfy notice and comment requirements found in the APA and the revisions suggested by FedEx are unnecessary. However, the proposed rules could benefit from additional clarification regarding their application to non-UPU international agreements and to proposals before the POC and CA.

Respectively Submitted,

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